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February 5, 2018

The Honorable Joan N. Erickson
District Judge, District of Minnesota
United States District Court
12W U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

The Honorable Franklin L. Noel
Magistrate Judge, United States District Court
District of Minnesota
9W U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

RE: *In re Bair Hugger Forced Air Warming Devices Products Liability Litigation*
MDL No. 15-2666-JNE-FLN

Dear Judges Erickson and Noel:

Defendants write to seek the Court's clarification and direction on a narrow issue that has arisen between the parties related to the timing of *Lexecon* waivers for the 100 cases in the Second Bellwether Selection group. Pretrial Order No. 24 sets out the timing and process for the selection of eight additional bellwether cases. The Order does not, however, address the deadline for each Plaintiff who has designated an alternative venue to notify Defendants whether they will or will not execute a *Lexecon* waiver consenting to trial in the District of Minnesota.

Defendants asked Plaintiffs' counsel to provide *Lexecon* waivers on a rolling basis, and no later than February 9, 2018 (the deadline set in Pretrial Order No. 24 for Plaintiffs to ascertain that the Bair Hugger was used in the surgeries at issue). By February 16, Defendants are required to challenge Plaintiffs as to any disputes about Bair Hugger use.

Based on the initial bellwether selection process, Defendants anticipate that a not insignificant number of Plaintiffs will choose not to execute *Lexecon* waivers (between 15 and 20 Plaintiffs out of the prior group of 150 chose not to waive *Lexecon* or failed to respond, effectively a non-waiver). Requiring a date certain by which Plaintiffs must respond will promote the efficient use

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of resources and allow both parties an equal opportunity to discontinue analysis of cases in which Plaintiffs do not consent to trial in the District of Minnesota.

The parties have exchanged correspondence on this issue. Defendants understand Plaintiffs are endeavoring to provide *Lexecon* waiver information by the end of February. Plaintiffs' counsel asserts it is not practical to send the information "piecemeal" and that the process will take significant time to accomplish. The 100 cases in the Second Bellwether Selection group were provided to the parties on January 19, 2018. Defendants contend the three weeks between then and February 9 should be sufficient to allow Plaintiffs' counsel to confer with their clients and respond, absent extenuating circumstances (for which Defendants would certainly be willing to meet and confer with Plaintiffs' counsel on a case-by-case basis).

Respectfully, Defendants request the Court require Plaintiffs to provide *Lexecon* waiver information for the 100 cases in the Second Bellwether Selection group on a rolling basis, and no later than February 9.

To promote the most efficient use of resources, Defendants further request this deadline be set as soon as possible.

Thank you for your consideration of this request.

Sincerely,

s/Mary S. Young

Mary S. Young
MSY: ck